



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R04-OAR-2012-0814; FRL-9782-6]

Approval and Promulgation of Implementation Plans; Region 4 States; 110(a)(2)(D)(i)(II)

Infrastructure Requirement for the 1997 and 2006 Fine Particulate Matter National

Ambient Air Quality Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve submissions from Alabama, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee for inclusion into each state's implementation plan. This proposal pertains to the infrastructure state implementation plans (SIPs) for these States as they relate to certain Clean Air Act (CAA or Act) requirements for the 1997 annual and 2006 24-hour fine particulate matter (PM_{2.5}) National Ambient Air Quality Standards (NAAQS). The CAA requires that each state adopt and submit a SIP for the implementation, maintenance, and enforcement of each NAAQS promulgated by EPA. These plans are commonly referred to as an "infrastructure" SIPs. Specifically, EPA is proposing to approve the submissions for Alabama, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee that relate to the infrastructure SIP requirement to protect visibility in another state. All other applicable infrastructure requirements for the 1997 annual and 2006 24-hour PM_{2.5} NAAQS associated with these States are being addressed in separate rulemakings.

DATES: Written comments must be received on or before [insert date 30 days after date of publication in the Federal Register].

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R04-OAR-2012-0814, by one of the following methods:

1. www.regulations.gov: Follow the on-line instructions for submitting comments.
2. E-mail: R4-RDS@epa.gov.
3. Fax: (404) 562-9019.
4. Mail: "EPA-R04-OAR-2012-0814," Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960.
5. Hand Delivery or Courier: Lynorae Benjamin, Chief, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding federal holidays.

Instructions: Direct your comments to Docket ID No. EPA-R04-OAR-2012-0814. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at www.regulations.gov, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit

through www.regulations.gov or e-mail, information that you consider to be CBI or otherwise protected. The www.regulations.gov website is an “anonymous access” system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through www.regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA’s public docket visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

Docket: All documents in the electronic docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office’s official hours of business are Monday through Friday, 8:30 to

4:30, excluding federal holidays.

FOR FURTHER INFORMATION CONTACT: Sean Lakeman, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. The telephone number is (404) 562-9043. Mr. Lakeman can be reached via electronic mail at lakeman.sean@epa.gov.

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I. Background

On July 18, 1997 (62 FR 38652), EPA established an annual PM_{2.5} NAAQS at 15.0 micrograms per cubic meter (µg/m³) based on a 3-year average of annual mean PM_{2.5} concentrations. At that time, EPA also established a 24-hour NAAQS of 65 µg/m³. *See* 40 CFR 50.7. On October 17, 2006 (71 FR 61144), EPA retained the 1997 annual PM_{2.5} NAAQS at 15.0 µg/m³ based on a 3-year average of annual mean PM_{2.5} concentrations, and promulgated a new 24-hour NAAQS of 35 µg/m³ based on a 3-year average of the 98th percentile of 24-hour

concentrations. By statute, SIPs meeting the requirements of sections 110(a)(1) and (2) are to be submitted by states within three years after promulgation of a new or revised NAAQS. Sections 110(a)(1) and (2) require states to address basic SIP requirements, including emissions inventories, monitoring, and modeling to assure attainment and maintenance of the NAAQS. States were required to submit such SIPs to EPA no later than July 2000 for the 1997 annual PM_{2.5} NAAQS, and no later than October 2009 for the 2006 24-hour PM_{2.5} NAAQS.

Alabama, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee's infrastructure submissions were received by EPA on July 25, 2008, July 23, 2008, August 26, 2008, December 7, 2007, April 1, 2008, March 14, 2008, and December 14, 2007, respectively, for the 1997 annual PM_{2.5} NAAQS; and on September 23, 2009, October 21, 2009, July 17, 2012,¹ October 6, 2009, September 21, 2009, September 18, 2009, and October 19, 2009, respectively, for the 2006 24-hour PM_{2.5} NAAQS. Alabama, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee were among other states that did not receive findings of failure to submit because they had provided a complete submission to EPA to address the infrastructure elements for the 1997 PM_{2.5} NAAQS by October 3, 2008.

The rulemaking proposed through today's action only addresses section 110(a)(2)(D)(i)(II) visibility requirements.

II. What are States Required to Address under Sections 110(a)(2)(D)?

Section 110(a)(2)(D) has two components: 110(a)(2)(D)(i) and 110(a)(2)(D)(ii). Section 110(a)(2)(D)(i) includes four distinct components, commonly referred to as "prongs," that must

¹ On July 17, 2012, Kentucky withdrew its September 8, 2009, 110(a)(1) and (2) infrastructure submission addressing the 2008 8-hour ozone, 2006 PM_{2.5} and 2008 Lead NAAQS. Kentucky replaced its September 8, 2009, section 110(a)(1) and (2) infrastructure submission with a submission provided on July 17, 2012.

be addressed in SIP submissions. The first two prongs, which are codified in section 110(a)(2)(D)(i)(I), are provisions that prohibit any source or other type of emissions activity in one state from contributing significantly to nonattainment of the NAAQS in another state (prong 1), and interfering with maintenance of the NAAQS in another state (prong 2). The third and fourth prongs, which are codified in section 110(a)(2)(D)(i)(II), are provisions that prohibit emissions activity in one state interfering with measures required to prevent significant deterioration of air quality in another state (prong 3), or to protect visibility in another state (prong 4). Section 110(a)(2)(D)(ii) requires SIPs to include provisions insuring compliance with sections 115 and 126 of the Act, relating to interstate and international pollution abatement.

EPA has previously taken action to address Alabama, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee's SIP submissions related to prongs 1 through 3 of section 110(a)(2)(D)(i) and the requirements of section 110(a)(2)(D)(ii) for the 1997 annual and 2006 24-hour PM_{2.5} NAAQS. Today's proposed rulemaking relates only to requirements of section 110(a)(2)(D)(i)(II) (prong 4), which as previously described, requires that the SIP contain adequate provisions to protect visibility in any other State. More information on this requirement and EPA's rationale for today's proposal that each state is meeting this requirement for purposes of the 1997 annual and 2006 24-hour PM_{2.5} NAAQS is provided below.

III. What is EPA's Analysis of How Region 4 States Addressed Element (D)(i)(II) related to Visibility?

Prong 4 of section 110(a)(2)(D)(i) requires that SIPs include provisions prohibiting any source or other type of emissions activity in one state from interfering with measures to protect

visibility in another state. In describing how its submission meets this requirement, Alabama, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee each referred to EPA-approved state provisions requiring electric generating units (EGUs) to comply with the Clean Air Interstate Rule (CAIR) and to the limited approval and limited disapproval of Alabama, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee's regional haze SIPs. Although Alabama, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee's regional haze SIPs have not been fully approved, EPA believes that the infrastructure SIP submission together with previously approved SIP provisions, specifically those provisions that require EGUs to comply with CAIR and the additional measures in the regional haze SIP addressing best available retrofit technology (BART) and reasonable progress requirements for other sources or pollutants, are adequate to demonstrate compliance with prong 4, thus, EPA is proposing to fully approve this aspect of the submission.

Alabama, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee's regional haze SIPs relied on previous incorporations of the CAIR into the EPA-approved SIPs as an alternative to the requirement that the regional haze SIPs provide for source-specific BART emission limits for sulfur dioxide (SO₂) and nitrogen oxides (NO_x) emissions from EGUs. CAIR, as originally promulgated, requires significant reductions in emissions of SO₂ and NO_x to limit the interstate transport of these pollutants, and EPA's determination that states could rely on CAIR as an alternative to requiring BART for CAIR-subject EGUs had specifically been upheld in *Utility Air Regulatory Group v. EPA*, 471 F.3d 1333 (D.C. Cir. 2006). Moreover, the states with Class I areas affected by emissions from sources in Alabama, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee had adopted

reasonable progress goals for visibility protection that were consistent with the EGU emission limits resulting from CAIR.

In 2008, however, the D.C. Circuit remanded CAIR back to EPA. *See North Carolina v. EPA*, 550 F.3d 1176 (D.C. Cir. 2008). The court found CAIR to be inconsistent with the requirements of the CAA, see *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008), but ultimately remanded the rule to EPA without vacatur because it found that “allowing CAIR to remain in effect until it is replaced by a rule consistent with [the court’s] opinion would at least temporarily preserve the environmental values covered by CAIR.” *North Carolina*, 550 F.3d at 1178.

After the remand of CAIR by the D.C. Circuit and the promulgation by EPA of a new rule – the Cross State Air Pollution Rule (CSAPR) or “Transport Rule” – to replace CAIR, EPA issued a limited disapproval of Alabama, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee’s regional haze SIPs (and other states’ regional haze SIPs that relied similarly on CAIR) because EPA believed that full approval of the SIP was not appropriate in light of the court’s remand of CAIR and the uncertain but limited remaining period of operation of CAIR. EPA finalized a limited approval of Alabama, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee regional haze SIPs, indicating that except for its reliance on CAIR, the SIP met CAA requirements for the first planning period of the regional haze program. *See* Alabama: July 28, 2012 (77 FR 38515); Georgia: July 28, 2012 (77 FR 38501); Kentucky: March 30, 2012 (77 FR 19098); Mississippi: July 27, 2012 (77 FR 38191); North Carolina: July 27, 2012 (77 FR 38185); South Carolina: July 28, 2012 (77 FR 38509)

Tennessee: April 24, 2012 (77 FR 243392), and November 27, 2012 (77 FR 70689).² EPA also finalized a limited Federal Implementation Plan for Georgia, Kentucky, South Carolina and Tennessee, which merely substituted reliance on EPA's more recent CSAPR's NO_x and SO₂ trading programs for EGUs for the SIP's reliance on CAIR. *See* 77 FR 33642, June 7, 2012.

Since the above-described developments with regard to Alabama, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee's regional haze SIPs, the situation has changed. In August 2012, the D.C. Circuit issued a decision to vacate CSAPR. *EME Homer City Generation*, 696 F.3d7 (D.C. Cir. 2012). In this decision, the court ordered EPA to "continue administering CAIR pending the promulgation of a valid replacement." Thus, EPA has been ordered by the court to develop a new rule, and to continue implementing CAIR in the meantime, and the opinion makes clear that after promulgating that new rule EPA must provide states an opportunity to draft and submit SIPs to implement that rule. Implementation of CAIR thus cannot be replaced until EPA has promulgated a final rule through a notice-and-comment rulemaking process; states have had an opportunity to draft and submit SIPs; EPA has reviewed the SIPs to determine if they can be approved; and EPA has taken action on the SIPs, including promulgating a Federal Implementation Plan, if appropriate.

At this time, the deadline for asking the Supreme Court to review this decision has not passed, and the United States has made no decision regarding whether to seek further appeal. Nonetheless, the EPA intends to act in accordance with the holdings in the *EME Homer City*

² Under CAA sections 301(a) and 110(k)(6) and EPA's long-standing guidance, a limited approval results in approval of the entire SIP submittal, even of those parts that are deficient and prevent EPA from granting a full approval of the SIP revision. *Processing of State Implementation Plan (SIP) Revisions*, EPA Memorandum from John Calcagni, Director, Air Quality Management Division, OAQPS, to Air Division Directors, EPA Regional Offices I-X, September 7, 1992, (1992 Calcagni Memorandum) located at <http://www.epa.gov/ttn/caaa/t1/memoranda/siproc.pdf>.

Generation opinion. Based upon the direction provided in that opinion for EPA to continue administering CAIR, the Agency believes that it is appropriate to rely on CAIR emission reductions for now for purposes of assessing the adequacy of Alabama, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee's infrastructure SIPs with respect to prong 4 while a valid replacement rule is developed and until implementation plans complying with any new rule are submitted by the states and acted upon by EPA or until the court case is resolved in a way that provides different direction regarding CAIR and CSAPR. In addition, EPA believes that based on the court's decision on CSAPR it would be appropriate to propose to rescind its limited disapproval of Alabama, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee's regional haze SIPs and propose a full approval, however, EPA is not at this time proposing to change the limited approval and limited disapproval of these states' regional haze SIPs. EPA expects to propose an appropriate action regarding Alabama, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee's regional haze SIPs in a separate rulemaking.

As neither Alabama, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee nor EPA has taken any action to remove CAIR from the Alabama, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee SIPs, CAIR remains part of the EPA-approved SIP and can be considered in determining whether the SIP as a whole meets the requirement of prong 4 of 110(a)(2)(D)(i). EPA is proposing to approve the infrastructure SIP submission with respect to prong 4 because Alabama, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee's regional haze SIPs which EPA has given a limited approval in combination with its SIP provisions to implement CAIR adequately prevent sources in Alabama, Georgia, Kentucky, Mississippi, North Carolina, South Carolina

and Tennessee from interfering with measures adopted by other states to protect visibility during the first planning period. While EPA is not at this time proposing to change the limited approval and limited disapproval of Alabama, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee's regional haze SIPs, EPA expects to propose an appropriate action regarding Alabama, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee's regional haze SIPs upon final resolution of *EME Homer City Generation v. EPA*.

IV. Proposed Action

As described above, EPA is proposing to approve submissions from Alabama, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee to incorporate provisions into the States' implementation plans to address prong 4 of section 110(a)(2)(D)(i) of the CAA for both the 1997 and 2006 PM_{2.5} NAAQS. Specifically, EPA is proposing to approve the States' prong 4 of section 110(a)(2)(D)(i) submissions because they are consistent with section 110 of the CAA.

V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. *See* 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this proposed action merely approves state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

EPA has preliminarily determined that this proposed rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because

the determination does not have “substantial direct effects” on an Indian Tribe as a result of this action. With respect to today’s proposed action as it relates to South Carolina, EPA notes that the Catawba Indian Nation Reservation is located within the South Carolina and pursuant to the Catawba Indian Claims Settlement Act, S.C. Code Ann. 27-16-120, “all state and local environmental laws and regulations apply to the Catawba Indian Nation and Reservation and are fully enforceable by all relevant state and local agencies and authorities.” Thus, the South Carolina SIP applies to the Catawba Reservation, however, because today’s proposed action is not approving any specific rule into the South Carolina SIP, but rather proposing that the State’s already approved SIP meets certain CAA requirements, EPA has preliminarily determined that there are no substantial direct effects on the Catawba Indian Nation. EPA has also preliminarily determined that these revisions will not impose any substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Particulate Matter, Reporting and recordkeeping requirements, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: February 7, 2013,

A. Stanley Meiburg,

Acting Regional Administrator,
Region 4.

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